United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1878

To be argued by
RICHARD WILE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1878

UNITED STATES OF AMERICA,

Appellee,

—v.—

THEODORE KOSS, KOSS SECURITIES CORPORATION, ERWIN LAYNE and WILLIAM McGEE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Theodore Koss, Koss Securities Corporation, Erwin Layne and William McGee appeal from judgments of conviction entered on June 14, 1974, in the United States District Court for the Southern District of New York, after a thirteen day trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Indictment 73 Cr. 903, filed on September 25, 1973, charged Koss, Koss Securities, Layne and McGee and twelve other defendants with conspiring to commit stock fraud and with twelve substantive counts including fraud in the offer and sale of securities, fraud in connection with the purchase and sale of securities, failing to deposit promptly the proceeds of an underwriting into an escrow account, mail fraud, making false statements to the Securities and Exchange Commission ("Commission") and submitting false documents to the Commission.

Count	*Defendants*	*Description of Violation Charged*	*Statutes Violated*
1	All defendants and seven unindicted individual and corporate co-conspirators	Conspiracy to violate securities laws and to commit mail fraud	Title 18, United States Code, Section 371.
2	Koss, Koss Securities and three other defendants	Fraud in the offer and sale of securities	Title 15, United States Code, Sections 77q and 77x; Title 18, United States Code, Section 2.
3	All defendants	Fraud in connection with the purchase and sale of securities	Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5; Title 18, United States Code, Section 2.
4	Koss, Koss Securities and another defendant	Failing to deposit promptly the proceeds of an underwriting into an escrow account	Title 15, United States Code, Sections 78o(c)(2) and 78ff and Title 17, Code of Federal Regulations, Section 240.15(c)2-4; Title 18, United States Code, Section 2.
5 through 11	All defendants	Mail fraud	Title 18, United States Code, Sections 1341 and 2.
12	Koss	Making false statements to the Commission	Title 18, United States Code, Section 1001.
13	Koss	Submitting false documents to the Commission	Title 18, United States Code, Section 1001.

Prior to trial, nine defendants pleaded guilty,* two defendants were severed ** and Count 12 (false statements) was severed.

The trial of Koss, Koss Securities, Layne, McGee and Stephen Hagler commenced on April 17, 1974. At the conclusion of the Government's case Judge Metzner, with the Government's consent, granted motions to dismiss Counts 6, 7, 9 and 10 (mail fraud) as to Koss, Koss Securities and Layne and Counts 5, 6, 7, 8, 9 and 10 (mail fraud) as to McGee and Hagler. The trial concluded on May 10, 1974 when the jury returned guilty verdicts with respect to Koss, Koss Securities, Layne and McGee and acquitted Hagler on all remaining counts.

On June 14, 1974 appellants were sentenced by Judge Metzner. Koss was sentenced to imprisonment for one year on Count 1, the imposition of sentence was suspended on Counts 2, 3, 4, 5, 8, 11 and 13, and Koss was placed on probation for three years. Koss Securities was fined $1,500.00 on Count 1, and the imposition of sentence was suspended on Counts 2, 3, 4, 5, 8 and 11. Layne was sentenced to imprisonment for one year on Count 1 (to be served concurrently with his existing four year sentence on a previous conviction but to commence on December 1, 1974, the date he otherwise would have been eligible for parole), the imposition of sentence was suspended on Counts 3, 5, 8 and 11, and Layne was placed on probation for three years. McGee received three months imprisonment on Count 1,

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* Stephan Zardus (Count 4), Robert Santis (Count 2), Herbert Shulman (Count 3), Steven Adlman (Count 1), Robert Kolbert (Count 1), Stanley Schwartz (Count 2), Martin Roth (Count 3), Irwin Hyman (Count 1) and Dan Anfang (Count 3).

** Samuel Weisman moved for a severance on medical grounds; after an examination of Weisman by a physician appointed by Judge Metzner, the Government did not oppose Weisman's motion, which was granted. The Government moved to sever defendant Harold Lassoff and for a joint trial of Weisman and Lassoff, which motion was granted without opposition.

the imposition of sentence was suspended on Counts 3 and 11, and McGee was placed on probation for two years.

Layne presently is serving his previous sentence. Koss and McGee are free on bail pending appeal.

Statement of Facts

The Government's Case

In July, 1968 Robert P. Santis founded and became president of Automated Information Systems, Inc. ("Automated"), a computer consulting company. During its first fiscal year Automated incurred a net loss on sales of approximately $56,000 and during its second fiscal year realized a net profit on sales in excess of $100,000 (Tr. 1146-47, 1191).*

In the Fall of 1970 Santis decided to make a public offering of Automated common stock. In September, 1970 Santis met Koss, the president and major stockholder of Koss Securities, who agreed that Koss Securities would underwrite the offering of 65,000 shares at $1 per share (Tr. 1148-49, 1548). For selling the offering Koss Securities was to receive total compensation of 15¢ per share (10¢ per share commission and 5¢ per share expense allowance). The offering had to be sold within thirty days from the effective date of the offering circular (DX A) or within an additional sixty days if the extension were agreed upon by Automated and Koss Securities. All funds collected from subscribers were to be held in an escrow account entitled "Koss Securities Corp. as Trustee for the Subscribers of Automated Information Systems, Inc." to be established at First Jersey National Bank, Jersey City, New Jersey ("First Jersey"). The offering was to be on a "best-efforts, all-or-none" basis, which meant that, if all 65,000 shares

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* "Tr." refers to the trial transcript. "DX" refers to defendants' exhibits in evidence. "GX" refers to Government's exhibits in evidence.

were not sold within the specified period, all moneys collected would be returned to the subscribers (Tr. 93-95a; DX A at 1, 8-9).

The offering circular became effective on December 2, 1970 (Tr. 1150; DX A at 1). In December, 1970 Koss was able to sell approximately 15,000 shares of Automated (Tr. 125-26, 1150). However, only one deposit of $3,000 was made into the escrow account in December, and none of that deposit consisted of money received from Automated subscribers (Tr. 456-59, 464, 466-67).

In January, 1971 it became apparent that Koss could not sell all 65,000 Automated shares. Therefore, in the middle of January, Santis and Koss met with Stephan Zardus, president and owner of Interstate Equity Corporation ("Interstate"), a brokerage firm. Zardus was informed that Koss was unable to sell the remaining 50,000 Automated shares. Zardus said he would attempt to sell those shares if Interstate were made co-underwriter of the Automated offering, thereby entitled to the expense allowance of 5¢ per share as well as the sales commission of 10¢ per share. Koss agreed to that arrangement, and the offering circular was amended on February 1, 1971 to include Interstate as co-underwriter (Tr. 529-32, 1150-52; DX A).

On February 1 Zardus began selling Automated. Zardus sold 1,000 shares to a Mrs. Appel, who mailed her $1,000 check in payment to Interstate. When he received Mrs. Appel's check Zardus made a telephone call to Koss to find out how to deposit the money in the escrow account in New Jersey. Koss said it was uncertain whether all the Automated stock would be sold by the deadline (now extended to March 2) and advised Zardus to deposit Mrs. Appel's check in Interstate's account, which Zardus did (Tr. 533-34).

Although initially optimistic, Zardus was able to sell only 4,400 Automated shares by February 15, and it was apparent to Koss, Santis and Zardus that the offering might fail (Tr. 532-35, 1152-53). In mid-February Murray Levine, an employee of Koss Securities, met with Michael Hellerman and Murray Taylor at Gatsby's, a Manhattan restaurant. Levine informed Hellerman and Taylor that Koss and Zardus had sold only approximately 19,000 of the 65,000 Automated shares. Hellerman and Taylor agreed to sell the remaining shares if they received half the proceeds of the offering (less brokers' commissions) and complete control of all 65,000 shares ("a box"), so that the price of the stock could be manipulated. Levine said neither Koss nor Zardus would sell any Automated stock unless directed by Hellerman ("back-door") and Hellerman agreed to buy Koss' customers' 15,000 shares for $1-½ per share (Tr. 127-32, 243, 257, 890-91).

Koss and Levine informed Santis there was a group who could sell the remaining Automated shares. Santis then received a telephone call from Taylor who arranged a meeting for the next morning at the Waldorf-Astoria Hotel. The meeting, which occurred between February 15 and 18, was attended by Santis, Levine, Hellerman and Taylor. Santis reluctantly agreed to a kick-back of half the proceeds of the offering to Hellerman and Taylor and said he would ensure that Koss kept his promise to Levine to sell Hellerman and Taylor the 15,000 shares. At about this time Hellerman formed a partnership with Taylor and Erwin Layne ("Hellerman group") for the Automated deal and they agreed to give half the profits to Hellerman and a quarter each to Taylor and Layne (Tr. 138-40, 262-63, 892-93, 924-25, 1153-56, 1191, 1193, 1213-14).

Santis next met with Zardus at the Plaza Hotel. Zardus was informed by Santis that a group would buy the unsold 45,600 Automated shares and that he had agreed to a kick-back of half the proceeds of the offering. Santis proposed

that Zardus handle the group's purchases for a total compensation of $1,500, which was more than the $660 Zardus would have earned for selling 4,400 shares, but less than the $7,500 for selling 50,000 shares; Zardus accepted (Tr. 536-37, 641).

Hellerman and Taylor then began to "sell" the remaining 45,600 shares. Hellerman, Taylor and Layne, who were going to receive approximately $31,000 from Santis for completing the underwriting, decided to purchase about 27,600 shares themselves. Abount 9,000 of those shares were purchased by Hellerman in the names of people he knew, and 18,600 shares were purchased in names Hellerman instructed Taylor to select from the Manhattan and Brooklyn telephone directories; the other approximately 18,000 of the 45,600 shares unsold by Koss and Zardus were purchased by acquaintances of Hellerman (Tr. 132-36).

On February 26, 1971 Hellerman, Taylor, Santis and Zardus met at the Waldorf-Astoria Hotel. Zardus had previously received money from some of Hellerman's customers and from Hellerman. Taylor instructed Zardus to send the offering circular and confirmations of purchase to the legitimate customers. To cover the balance due to Zardus, Hellerman gave Zardus approximately $22,000 in cash and Taylor gave Zardus checks for $4,000 (GX 6) and $2,000 (GX 7). Zardus was told by Taylor that he would call the next day with the names of the rest of the purchasers (Tr. 141, 145-49, 242, 541-42, 548-49, 560, 1156-57, 1212-13). After the meeting Zardus returned to Interstate's office and informed Koss by telephone that the underwriting was going to be successful because of Hellerman and Taylor and that Interstate was receiving reduced compensation because of the kick-back promised to Hellerman and Taylor by Santis (Tr. 542-43).

On February 27 Taylor gave Zardus the names selected from telephone books. Taylor instructed Zardus not to send the offering circular and confirmations of purchase to

those persons and to retain custody of the stock certificates issued to them (Tr. 438-39, 442, 508, 511, 544-48, 1071-72).

On March 4 Zardus gave Santis checks drawn on Interstate's account at Chase Manhattan Bank for $24,000 (GX 8(a)) and $24,500 (GX 8(b)), representing the proceeds of the sale of 50,000 Automated shares less Interstate's compensation of $1,500. At about the same time Santis met with Hellerman at the Park Sheraton Hotel. Santis asked Hellerman how the $31,000 kick-back should be treated in Automated's records; Hellerman suggested that Santis attribute the amount to the purchase of a patent from a fictitious person. Hellerman also asked Santis for a loan of an additional $10,000 of working capital so that Hellerman could begin to pay brokers to buy Automated stock in the after-market, thereby raising the price. Santis agreed. On March 5 Taylor accompanied Santis to the Needham National Bank of Needham, Massachusetts, where Santis deposited in Automated's account the chceks for $48,500 received from Zardus and obtained cashier's checks for $10,000 (GX 66(a)) and $11,000 (GX 66(b)) payable to "Louis Greenblatt." Santis gave the "Louis Greenblatt" checks to Taylor, who had them cashed in New York by Irving Lazarus, a discounter of commercial paper. Hellerman, Taylor and Layne divided the proceeds. One week later the remaining $20,000 due from Santis to the Hellerman group ($10,000 kick-back and $10,000 loan) was wired from the Needham National Bank to Lazarus, from whom Taylor received cash which he delivered to Hellerman (Tr. 150-52, 156-59, 270, 518, 521, 894, 1140, 1157-61, 1188, 1203).

Santis encountered difficulty in getting Koss to turn over the proceeds of the 15,000 Automated shares sold by him. Monthly statements of the escrow account (GXs 18-21) revealed that no deposits were made from December 31, 1970 to March 4, 1971, and the account balance was

still $3,000.* Finally, on March 5, $9,800 was wired from the branch of Chase Manhattan Bank on Avenue M in Brooklyn, where Koss Securities' account was maintained, to First Jersey and Koss Securities' account was correspondingly debited. By letter dated March 9, 1971 (GX 24) Koss directed First Jersey to draw a check payable to Automated for $12,750 ($15,000 less Koss' compensation of $2,250). On approximately March 10 Koss gave Santis a First Jersey cashier's check for $12,750. (Tr. 456-58, 460-63, 1164-68, 1174-76, 1195, 1197, 1495-97; GX 25).

The public offering was thus completed without the offering circular having been amended to state that: (1) the Hellerman group in effect had underwritten the offering; and (2) $41,000 of the proceeds of the offering were to be given to the Hellerman group rather than applied as specified in the offering circular (DX A at 7-9).

The Hellerman group began acquiring Automated shares from Koss in early April. On April 5 or 6 Taylor told Zardus that Koss would be calling to sell Automated stock at approximately $1-½ per share. Taylor said he would tell Zardus which Interstate accounts he should credit with the purchases and also would provide Zardus with the money to pay Koss for those shares. On April 7 Koss called Zardus, and Interstate purchased from Koss Securities, at a price of $1-5/16 per share, 1,000 shares each for the accounts of Shirley Margulies and Sidonie Horner, names previously selected by Taylor from the telephone books (Tr. 561-62, 564-65, 574-75, 1071-72).

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* The Government did not attempt to establish when Koss actually received payment for the 15,000 Automated shares sold in December, 1970. However, some of Koss' customers did testify: Charles Gols paid for the purchase of 600 shares by check dated January 7, 1971 (GX 34) and Leonard Reisch paid for 300 shares by check dated January 21, 1971 (GX 31(b)), both of which were deposited in the account of Koss Securities (Tr. 690-91, 759-62).

On April 8 Hellerman and Taylor went to Miami Beach, Florida. There Hellerman began to recommend purchases of Automated stock in order to create demand and raise the price. On April 12, after Hellerman learned that 4,100 shares had been purchased, he called Zardus to find out how many shares were needed to satisfy orders for Automated. Zardus told Hellerman that fewer shares were needed than Hellerman knew had been purchased, so Hellerman concluded that Koss Securities, the only source of Automated stock other than Interstate, was selling the stock, or "back-dooring" (Tr. 160-65, 229, 562). Hellerman called Koss Securities and was informed that Koss was vacationing at the Eden Roc Hotel in Miami Beach. Hellerman and Taylor immediately went to the Eden Roc and located Koss by the pool. Koss, Hellerman and Taylor went to Koss' room, where Hellerman accused Koss of violating the agreement with Murray Levine to sell the 15,000 shares of Automated to Hellerman for $1-½ per share by selling Automated stock in the open market. Koss admitted having sold 1,200 shares, but claimed that the agreement with Levine was not binding vis-a-vis Hellerman, with whom Koss wanted to renegotiate (Tr. 167-70, 280, 507, 912, 968, 1724). Koss also told Hellerman:

> "I know you're going to run the market now and I know there's going to be a big jiggle in the stock now and I want the benefit of it and I don't want to sell the stock at $1.50 and I want to keep some of the stock" (Tr. 169).

The meeting concluded with an agreement that Koss could retain 5,000 shares of Automated which would be sold into the market proportionately as the Hellerman group sold its shares, and that Koss would sell his remaining 6,800 shares to Hellerman for $1-½ per share (Tr. 170-72, 896-98, 931-32).

Within a day of the meeting with Koss at the Eden Roc, Taylor called Zardus and told him that Koss would be selling more shares to Interstate at prices around $1-½ per share, that Taylor would pay for the purchases by Interstate and that Taylor would provide Zardus with the purchasers' names. Between April 12 and 14 Interstate purchased 2,200 shares from Koss Securities for $1-½ per share and 800 shares for $1-⅜ *; 1,000 shares were placed in each of the telephone book names Max Allentuck, Walter Allen and Floyd Cooper (Tr. 438-39, 545, 563, 577-78, 584).

Hellerman returned to New York on April 18 and for a period thereafter was in constant contact with Koss by telephone. During one such conversation Koss threatened that, if Hellerman did not enable Koss to get rid of his Automated shares more quickly, Koss would "bang the market" (sell his shares on the open market, thereby lowering the price). In order to gain time Hellerman told Koss to open accounts for Robert Angona and Donald Saxon and to sell Automated stock into those accounts, for which Angona and Saxon would pay. Confirmations of purchase produced by Koss Securities pursuant to subpoena disclosed purchases on

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* John Murphy, whose 1,000 shares were sold by Koss Securities to Interstate on April 12, was sure Koss must have recommended the sale. The confirmation of sale received in the mail by Murphy (GX 58) reflected a price of $1-⅛ per share, whereas the confirmation of sale produced by Koss Securities pursuant to subpoena (GX 2(q)) and Interstate's records reflected a price of $1-½ per share. Other confirmations of sale produced by Koss Securities disclosed that, within four days of that transaction, Koss Securities purchased a total of 2,800 shares for its own account from its customers Garrson (300 shares on April 8) (GX 2(4)), Braunstein (300 shares on April 8) (GX 2(m)), Howard (300 shares on April 8) (GX 2(n)), Gearhart (1,000 shares on April 13) (GX 2(t)), Darcy (100 shares on April 14) (GX 2(v)), Rostoker (100 shares on April 14) (GXs 2(y) and 37), Daskalakis (200 shares on April 14) (GXs 2(w) and 61(b) and Patel (500 shares on April 16) (GX 2(bb)), all for the price of $1-½ per share. Koss also recommended that Daskalakis sell his shares (Tr. 577-78, 678, 680, 1181-82, 1238).

April 19, 1971 of 1,500 Automated shares by Angona (GX 1(mm)) and 1,000 shares by Saxon (GX 1(nn)). Koss called Saxon, told him that Hellerman or Taylor had purchased stock in Saxon's name and asked Saxon for his Social Security number (Tr. 173-76, 180, 1276-77, 1299, 1385).

Hellerman suspected that Koss had sold more shares than he had admitted in Florida. Therefore Hellerman asked Layne to go to Koss Securities to determine how many Automated shares were actually there. Layne called Hellerman from Koss Securities and said there was "a lot of stock up here." Later Layne told Hellerman that he was going to pretend to be Koss' "protector" against Hellerman in order to gain Koss' confidence and be able to tell Hellerman what Koss was doing (Tr. 176-77).

On or about April 21 Hellerman invited Koss to the Carriage House in Manhattan, where Hellerman and Taylor were building a restaurant and also rented a suite which they used for an office. Present were Hellerman, Taylor, Layne, Koss, Zardus and Santis, who was still trying to get Hellerman to repay the $10,000 loan. Koss screamed at Hellerman that he was not letting Koss dispose of his Automated stock fast enough and threatened to sell that stock into the market unless Hellerman bought it for the increased price of $2-½ per share. Hellerman shouted that Koss had made a deal and had to abide by it. Koss yelled back that he wanted a "bigger piece" of the deal. When the proceedings became calmer Hellerman agreed to purchase the stock for $2-½ per share and Koss agreed to give possession of the stock to Layne so that Hellerman could sell it in order to obtain the money to pay Koss. Layne went to Koss Securities and returned with certificates for 5,000 Automated shares. Hellerman paid Koss $7,500 in installments for the 5,000 shares and, in late July, finally told Koss that he would not be paid the additional $5,000 (Tr. 178-82, 229-31, 247-48, 296, 303-04, 567-69, 895-96, 1168-74, 1200-02, 1208-09).

Between early March, when the public offering of Automated was completed, and early April, the Hellerman group did not begin to manipulate upward the price of Automated stock (Tr. 244-46). Then, in early April, Murray Levine introduced Hellerman to Herbert Shulman, a stock trader employed by the brokerage firm Dopler, Gray & Co., Inc. ("Dopler, Gray"). Dopler, Gray was a "market-maker" for Automated, i.e., an intermediary between sellers and purchasers.* Hellerman, Taylor, Layne, Koss and Levine agreed to pay Shulman for buying and selling Automated stock only at prices dictated by Hellerman (Tr. 206-08, 895, 927).

Having achieved virtual control of all available Automated stock and of the market-place, the Hellerman group began to sell its Automated stock. Between April 12 and May 6, Interstate, for prices in the range from $2 to $5-⅛ per share, sold a total of 21,400 shares, all of which had been purchased originally in telephone book names (Tr. 544-45, 574, 578-85, 614). In order to realize the profits from those transactions it was necessary for the Hellerman group to effect transfers of Automated stock certificates issued in telephone book names and to be paid for the sales of that stock. The second was more easily accomplished. Zardus made out Interstate checks in the names of the telephone book sellers and gave the checks to Hellerman and Taylor (Tr. 188, 197, 585-88). The endorsement signatures were forged, right-handed, left-handed and slanted different ways, by Hellerman, Taylor, Layne, Martin Roth "and anybody else . . . that was around the Carriage House" (Tr. 198). Most of those Interstate checks (GXs 5(a)-(s), (u) and (x)-(aa)) were cashed for Hellerman and Taylor by Lazarus for a fee of one percent (Tr. 197-98, 439, 443, 509-11, 519-21, 1073). Three of the Interstate checks payable to telephone book names (GXs 5(t), (v) and (w))

* Interstate did not have sufficient capital to be a market-maker ("go in the pink sheets") (Tr. 622).

were second endorsed "Koss Securities Corp." and cashed at the Avenue M branch of Chase Manhattan Bank, for which Koss was paid one percent (Tr. 198-203, 231, 275-77).

It was more difficult to transfer the Automated stock issued in telephone book names to subsequent purchasers. In order to transfer stock certificates the endorsement of the registered owner must be guaranteed by a brokerage firm that is a member of the New York Stock Exchange or by a bank. A brokerage firm that does not belong to the New York Stock Exchange, like Koss Securities, in order to transfer a customer's stock certificate, must guarantee the customer's signature and then obtain an additional guarantee by a member firm or bank (Tr. 431-33, 436-37, 446). Interstate's attempts to obtain signature guarantees by member firms were unsuccessful (Tr. 622). Consequently Taylor took many of the certificates issued in telephone book names to the suite at the Carriage House, where Hellerman, Taylor, Layne, Roth and others again forged the requisite signatures right-handed and left-handed (Tr. 183, 570). By telephone Hellerman told Koss that signature guarantees were needed and, at the close of that business day, Koss went to the Carriage House suite. Koss told Hellerman that he had a connection at the New York Stock Exchange member firm Schweickart & Co. ("Schweickart") who would provide the necessary signature guarantees for $500. Koss then placed Koss Securities' guarantees on the certificates. Hellerman gave $500 to Taylor who, the next morning, accompanied Koss to Schweickart (Tr. 182-85, 235, 277-79). However Koss returned with approximately only half of the certificates (GXs 29(aaa)-(www)), representing 8,700 shares, guaranteed by Schweickart, which had been too busy to guarantee all the certificates (Tr. 185, 279, 421, 428, 439-40, 443, 445-48, 1073). Of course Hellerman quickly realized that Koss might have to be paid $500 every time it was necessary to transfer the telephone book shares. Therefore Hellerman sent Taylor and Layne to a printing shop near Grand Central Station in Manhat-

tan, where signature guarantee stamps for Schweickart, Manufacturers Hanover Trust Company and Bankers Trust Company were purchased (Tr. 186-87, 279). The forged endorsements on the stock certificates issued in telephone book names and bearing signature guarantees previously affixed by Koss (GXs 28(m)-(q), 29(a)-(h), (j)-(v), (y), (z), (bb)-(hh), (kk)-(mm) and (pp)-(xx)) then were fraudulently guaranteed by means of those rubber stamps and signatures, purporting to be by officers of the three institutions, which were forged by Hellerman, Taylor, Layne and Roth (Tr. 187-88, 279, 421, 426-28, 448-51, 511-12, 880). The certificates, on which all signatures by registered holders were forged but signature guarantees were both legitimate and forged, were returned by Taylor to Interstate and, except for those issued to "Gail Eastburn" (GXs 28(m)-(q)),* sold by Zardus pursuant to instructions received from Taylor (Tr. 225, 570-71, 578-83, 634-35, 1384).

The price of Automated stock during the period from April 16 to May 14, as reflected in the "pink sheets," ** ranged from the lowest bid price of $3-¼ to the highest asked price of $5-½ (Tr. 1441-43, 1493; GX 85). In order to maintain those prices, Hellerman and Taylor were touting the stock to various people. Among the persons to whom Hellerman made such recommendations were Jackie Mason, an entertainer, and Bernard Weber, Mason's business manager and close friend. Upon Hellerman's advice that Automated "is going to go up to millions upon millions," Mason, on April 21, 1971, purchased 600 shares through the brokerage firm Edwards & Hanley, from whom he received

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* The "Gail Eastburn" shares were given to Koss by Zardus at the direction of Hellerman, who, at the time, was trying to cooperate with Koss (Tr. 225, 1384).

** The "pink sheets" are published daily by the National Quotation Bureau and list the names of brokers and the prices at which they have offered to buy and sell over-the-counter securities, but not information with respect to actual transactions (Tr. 245-46, 1441-42, 1489-90).

a confirmation of purchase by mail (GX 67). Upon Hellerman's recommendation Weber, on May 4 and 5, purchased 2,000 shares, also through Edwards & Hanley, from whom he received confirmations of purchase by mail (GXs 86(a)-(c); Tr. 224, 1339-40, 1344, 1363-65). When Taylor said that Automated stock "is going to keep moving into the millions" Mason agreed to purchase an additional 1,100 shares. Mason gave Taylor a check dated April 28, 1971 in the amount of $5,923.75 which, as Taylor instructed, was made payable to "Koss Securities Corp." (GX 68; Tr. 1340-44). After a week or two Mason, not having received a confirmation of purchase from Koss Securities, made a telephone call to Koss. Koss told Mason that his check had been used by Taylor to repay a personal debt to Koss. When Weber called Koss on Mason's behalf, Koss denied receiving the check. Weber obtained the cancelled check, which had been endorsed "Koss Securities Corp." and deposited in the Chase Manhattan Bank, and called Koss again. This time Koss admitted receiving Mason's check but claimed that he had received the check from Taylor in payment of stock purchased for another person, not specified (Tr. 1340-46, 1365-69). Mason wrote a letter to the National Association of Securities Dealers, Inc. ("N.A.S.D."), which forwarded Mason's complaint to Koss. By letter to the N.A.S.D. dated July 14, 1971 (GX 81(b)), Koss claimed he had received Mason's check from Robert Angona and Donald Saxon in payment of stock purchased by them (Tr. 1323-26). Of course the Saxon and Angona stock actually had been purchased by Hellerman in fulfillment of his obligation to acquire Koss' Automated stock and at least Saxon never opened an account at Koss Securities (Tr. 174-75, 224, 306-07, 1276-77, 1298-99, 1385).

By the end of May the Hellerman group was having difficulty obtaining additional purchasers of Automated stock and their goal became selling their remaining shares rather than raising the price (Tr. 296-97, 304-05). Around May 20 Taylor introduced Hellerman to Steven Adlman,

who in turn introduced Robert Kolbert, a registered representative of the brokerage firm Ferkauf, Roggen, Inc. "Ferkauf"). Adlman and Kolbert represented to the Hellerman group that they could "retail . . . a lot of stock" (induce purchases by brokers and their customers) (Tr. 208-10, 978, 1011). Hellerman said that his group would pay Adlman and Kolbert for Automated shares they were able to sell.* Adlman and Kolbert decided to accept the offer, pay bribes with the money received from the Hellerman group and retain the difference (Tr. 717-19, 783-84, 979-80). In order to provide Adlman and Kolbert with working capital, and to get rid of stock, Hellerman entrusted Adlman with certificates for 2,000 shares of Automated stock registered in "street name."** Adlman took the certificates to the brokerage firm P.J. Gruber & Co., Inc. ("Gruber"), which caused four 500 share certificates to be issued in Adlman's name (GX's 50(a)-(d)). Adlman then sold the 2,000 shares to Gruber, and the confirmation of sale received by Adlman (GX 49) reflected net proceeds of $7,725 and the trade date of May 27, 1971 (Tr. 211-12, 319, 429-30, 981-83, 986-88, 1017-19). Adlman received checks for approximately $7,000 and $1,000 from Gruber for the sale (Tr. 983-85). Hellerman, Taylor, Layne and Adlman went to Lazarus' store and cashed the $7,000 check, of which the Hellerman group received approximately two-thirds and Adlman and Kolbert one-third (Tr. 212, 984-85). The $1,000 check was cashed by Adlman and Layne at American Bank & Trust Co., the drawee bank, and the proceeds retained by Adlman and Kolbert (Tr. 984, 986, 988).

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* The testimony conflicted with respect to the precise amount of the proposed payments to Adlman and Kolbert. Hellerman testified they would be paid $2 per share (Tr. 210), Kolbert testified $1-½ per share (Tr. 716, 784) and Adlman testified that the profit on the Hellerman group's sales above their $1 cost would be split evenly (Tr. 978-79).

** "Street name" is a name in which a brokerage firm holds stock either owned by it or owned by its customers and retained in the custody of the firm.

In May, 1971 William McGee, whom Kolbert had known since 1969, worked for the branch of Chelsea National Bank at the Avenue of the Americas and Fifty-third Street in Manhattan (Tr. 721). McGee had a brokerage account with Executive Park Securities ("Executive Park"), the principals of which were Giulio Ghiron and Paul Weissberg. McGee, having made a profit of approximately $4,000 on the basis of recommendations by Executive Park, made an unsecured loan of $5,000 to Ghiron and Weissberg. The interest rate and repayment date were not established, and McGee expected preferential treatment (Tr. 1083-85, 1096, 1241-42, 1248, 1567-69, 1581). During the first week in June Kolbert was told by McGee that he had an interest in Executive Park. That same week Kolbert told McGee that there were very few shares of Automated stock on the market ("a thin float"), that the company had good earnings and that the stock, then trading between $4-3/8 and $4-7/8, could rise in price to $8 or $9 "if the float were put away" (available shares taken off the market); Kolbert also offered McGee $100 for every 100 Automated shares that Executive Park purchased. McGee told Kolbert to repeat that same information to "Paul" at Executive Park, but to omit any reference to the $100 per 100 shares payoff (Tr. 722-24, 796-98, 871, 992). Kolbert followed McGee's instructions during a telephone conversation with Weissberg and then told Weissberg to speak to McGee (Tr. 724, 1086-86a, 1097). Immediately thereafter Weissberg spoke with McGee, who repeated what he had been told by Kolbert (Tr. 1087-88, 1098). Executive Park bought 1,000 shares for its own account on June 8 and more shares later, but resisted McGee's blandishments to "make a name for [itself] in the street" by recommending Automated to customers (Tr. 1088-90, 1244-45). McGee informed Kolbert about Executive Park's 1,000 share purchase and claimed he could "do more stock" if he were paid for those shares. On about June 11 Adlman collected $1,000 from Hellerman which was given to Kolbert, who gave it to McGee at the Steer Palace, a restaurant near Seventh Avenue and Thirty-

fourth Street in Manhattan (Tr. 725-26, 995-96). On approximately June 14 Taylor learned from Koss that Executive Park had purchased additional Automated shares. $500 more was transferred from Hellerman to Adlman to Kolbert; Kolbert paid the $500 to McGee at the Americana Hotel (Tr. 727-28, 995-96). McGee's effort to collect additional money due him was unsuccessful (Tr. 994-95). When McGee testified before the Grand Jury on September 20, 1973 he denied knowing whether Executive Park ever purchased Automated stock (Tr. 1571-72).

A "wooden ticket" is an order executed by a broker on behalf of a customer who has no intention of paying for the stock purchased (Tr. 117). As the Automated manipulation was collapsing for lack of buying power, the Hellerman group began to place wooden tickets in mid-June as a final effort to sell their Automated stock (Tr. 220). Layne introduced Hellerman to John Serbes, who placed a wooden ticket for 2,000 Automated shares with Jas. H. Oliphant & Co., Inc. (Tr. 222-23, 321-22). On June 9 (GXs 53(a) and (b)) and June 14 (GXs 54(a) and (b)), Layne, in the presence of Hellerman and Taylor, placed wooden tickets with Harris, Upham & Co., Inc. for 4,000 shares and a total unpaid purchase price of $20,101.40 (Tr. 220-22, 321-22, 686, 1128-30, 1136). At about the same time Layne and Taylor attempted to place a wooden ticket for 1,000 shares with Ferkauf, but the order was refused after a discussion between Kolbert and his compliance director (Tr. 734-36).

On June 15, 1971 Koss voluntarily appeared to testify before the Commission. At that time a "blue questionnaire" (GX 75) was submitted by Koss, which he said reflected all transactions of Automated Stock by Koss Securities and its customers during the period March 1, 1971 to June 15, 1971. Also submitted at that time was a trading ledger (GX 76), which Koss claimed accurately reflected all transactions in Automated stock for the account of Koss Securities ("house account") in the after-market (Tr. 1303-

04, 1306-08, 1549-50, 1565-66). Attilio J. Veneziano, a Commission compliance examiner, visited Koss Securities in October and November, 1971 at which time he received from a cashier at Koss' direction the house account trading ledger for Automated, of which a copy was made (Tr. 1327-29; GX 77). GXs 75, 76 and 77 contained numerous inconsistencies with each other and with confirmations of transactions submitted by Koss Securities in 1974 pursuant to subpoena (GXs 1(a)-(nn), 2(a)-(ee) and 84(a)-(d)) (Tr. 1391-1407, 1491). Moreover, in May, 1971, Hellerman was told by Koss that he had been able to avoid difficulties with the Commission because he had two sets of books, one set that accurately reflected the state of his business and a second set for the Commission in the event of an investigation (Tr. 225-26).

On June 21, 1971 the lowest price bid for Automated was $4-⅝ and on June 28 the lowest bid price was $¼ (Tr. 1441-43, 1493; GX 85).

The Defense Case

1. Koss and Koss Securities

Koss did not testify in his own behalf. Koss' wife Katherine testified that she was the secertary-treasurer in charge of Koss Securities' operations section ("back office") (Tr. 1698-99). She said that their business practice was not to require a customer to sign a stock certificate in their presence (Tr. 1701-04). Mrs. Koss testified that Murray Levine's employment with Koss Securities terminated approximately in the Spring of 1971, but that Levine was in Koss Securities' office frequently thereafter (Tr. 1706-10; DX K). Mrs. Koss denied that she or her husband had signed an Interstate telephone book fictitious customer check (GX 5(t)) cashed at Koss Securities' bank (Tr. 1710-15). Finally, Mrs. Koss attempted to rebut Hellerman's testimony concerning the agreement reached by him and Koss at the Eden Roc in Miami Beach by claiming that her

husband had not been out of her presence during that vacation and that Hellerman and Koss only had a brief, casual conversation near the swimming pool (Tr. 1715-17). On cross-examination Mrs. Koss said neither she nor her husband would guarantee signatures on stock certificates by persons not known to them (Tr. 1717-19). She also said it was her husband's function to review Koss Securities' books and records (Tr. 1720). Mrs. Koss testified that document submitted by Koss to the Commission (GX 76) was Koss' position sheet, not the house account trading ledger, that she did not consider the position sheet a record and that the position sheet "would mean nothing" if turned over to the Commission (Tr. 1731-33).

Charles McFall, a customer of Koss Securities, testified that he purchased Automated upon Koss' recommendation but refused to sell it when Koss suggested (Tr. 1686-88). McFall said he had picked up his Automated certificates, which he still owned at the time of trial, at the office of Koss Securities (Tr. 1692-93).

David Gross, a real estate operator, and George Lukashuk, the retired pastor of Holy Trinity Church in Brooklyn, testified as character witnesses that they had not heard unfavorable things about Koss (Tr. 1695-96, 1858-59).

2. Erwin Layne

Erwin Layne did not testify and called no witnesses in his behalf. Layne stipulated with the Government that a handwriting expert, because he did not know the manner in which signatures had been written on the Interstate checks payable to names from the telephone directories (GXs 5(a)-(aa)), was unable to identify any of those signatures as written by Layne and that no handwriting analysis was performed on the corresponding stock certificates (GXs 28(a)-(q), 29(a)-(z), (aa)-(xx) and (aaa)-(www)) (Tr. 1683-84).

3. William McGee

William McGee testified on his own behalf. He said he did lend $5,000 to Ghiron and Weissberg but did not have an interest in Executive Park (Tr. 1644-45). He said that he now remembered recommending Automated to Executive Park, although he had not when testifying before the Grand Jury (Tr. 1647-48). McGee denied receiving $1,500 from Kolbert (Tr. 1651). McGee testified that, after his Grand Jury testimony, he remembered additional facts and requested another opportunity to testify, but that Assistant United States Attorney Sorkin had refused (Tr. 1647-48). On cross-examination McGee admitted that he requested a second appearance before the Grand Jury only after a conversation in which Sorkin had said that, in his opinion, McGee lied during his first appearance Tr. 1657-58). McGee also said that, in 1971, he earned $12,000 or $13,000 per year from Chelsea National Bank and was making alimony and child support payments (Tr. 1680-81).

ARGUMENT

POINT I

The evidence against Koss and Koss Securities was sufficient to establish their guilt on the conspiracy count and the substantive counts.

Koss and Koss Securities claim that the evidence was insufficient to sustain their convictions on any count of the indictment. Such contentions are frivolous. Of course, after conviction, evidence must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Arroyo*, 494 F.2d 1316, 1317 (2d Cir. 1974).

A. The Conspiracy Count

The Government's evidence was that Koss first participated in the conspiracy when, Koss and Zardus having been unable to sell 65,000 shares, Murray Levine entered into an agreement on Koss' behalf with Hellerman that if Hellerman would successfully complete the offering Koss would not "back-door" the 15,000 shares he had sold, which would be transferred to the Hellerman group for $1-½ per share as part of the arrangement to give Hellerman compete control of the market in Automated shares. Shortly thereafter Koss and Levine informed Santis that a group could sell out the offering. On February 26 Zardus told Koss about the kick-back from Santis to the Hellerman group.

After the public offering was completed by the Hellerman group's purchases, most of Koss' efforts were devoted to using his 15,000 shares as leverage to improve the bargain he had made with Hellerman. As part of the arrangement for Hellerman to have "a box" in Automated, Koss sold 5,000 shares to Interstate between April 7 and

April 14, 2,000 shares for $1-5/16, 800 for $1-3/8 and 2,200 for $1-1/2. In Florida Koss induced Hellerman to allow Koss to benefit from the manipulation by retaining 5,000 shares, in exchange for selling his then remaining 6,800 shares to Hellerman for the agreed-upon $1-1/2 price, so long as Koss did not jeopardize the manipulation by selling those 5,000 shares indiscriminately. In order to keep his agreement, Koss had to recommend that his customers sell Automated at the same time as Koss was acquiring it. Subsequently Koss complained that Hellerman was not allowing Koss to dispose of his shares quickly enough. The 2,500 shares placed by Koss in the accounts of Angona and Saxon were the result of threats otherwise to sell on the open market shares that Hellerman could not absorb. Finally, at the Carriage House, Koss agreed to give possession of 5,000 shares to Layne if Hellerman would pay $2-1/2 per share. Layne picked up those shares from Koss and delivered them to Hellerman, although Hellerman eventually only paid Koss the original price of $1-1/2. In an attempt to recoup, Koss applied the Jackie Mason check to the purchase of the Saxon and Angona stock.

Finally, Koss received payment for cashing the forged Interstate checks payable to telephone book names and guaranteeing forged signatures on stock certificates issued in telephone book names. He also procured from Schweickart member firm guarantees of such signatures on 8,700 shares.

The insufficiency arguments advanced by the Koss defendants are only attempts to dispute the Government's evidence. The claim that Koss did not have certificates for 5,000 shares that Layne could pick up and deliver to Hellerman in late April, 1971, is premised on the wholly unsupported assertion that the transfer agent mailed all certificates to Koss' customers, rather than to Koss Securities. Hellerman was told by Layne that Koss had "a lot of stock."

Koss' own witness McFall testified he had to go to Koss Securities to get his 500 shares. Even the evidence adduced by Koss does not support the argument about the 5,000 shares. Koss' records showed he purchased 4,000 shares from customers from March 23 to April 20. In addition, Saxon testified he never bought any stock from Koss, so the 1,000 shares transferred from Dugan's account to Saxon's account were available to Koss. Moreover it can reasonably be inferred that the 1,500 share trade from Koss Securities to Angona was fraudulent and those shares were also in Koss' possession. And Koss' figures account for only 200 of the 1,000 shares issued to his customer Macher, who did not order the stock; the other 800 Macher shares were also available for Koss to give to Layne. Finally, no argument which depends upon Koss' records to exonerate him can be given credence, in view of Koss statement to Hellerman about maintaining two sets of books.

Hellerman testified that Koss Securities sold 5,000 shares to Interstate as part of the original agreement to give Hellerman "a box" in Automated. The argument that those transactions, which commenced prior to the Eden Roc meeting with Koss, Hellerman and Taylor, could not have been pursuant to the conspiracy ignores the fact that, in February, Levine, on Koss' behalf, agreed to sell 15,000 shares to the Hellerman group for $1-\frac{1}{2}$.

The contention that Koss' guarantees of forged signatures on stock certificates were not pursuant to conspiracy proceeds on the assumption that Koss did not know such signatures were not genuine. That basic assumption is rendered invalid by evidence that Koss said he needed $500 to bribe a Schweickart employee to affix Schweickart's guarantee and Mrs. Koss' testimony that she and her husband only guaranteed signatures of their customers, whom she said they knew.

Koss' application of Jaceik Mason's check was further evidence of Koss's participation in the conspiracy. The use of Mason's check makes it apparent that Koss knew he could not look to Angona and Saxon for payment for their stock. Moreover, Koss' false exculpatory statements, to Mason that the check was in payment of a personal debt of Taylor's, to Weber that the check had not been received and to the N.A.S.D. that the check had been received from Angona and Saxon, not Taylor, are evidence that Koss knew the Angona and Saxon stock was purchased by Hellerman pursuant to the conspiracy.

Finally Koss claims he did not have the requisite "stake in the outcome" of the conspiracy. That claim does not take cognizance of the fact that Koss would have had to return all moneys to subscribers if Hellerman had not completed the offering, which enabled Koss to earn his underwriters' compensation of $2,250. Koss eventually insisted on keeping 5,000 Automated shares so that he too could profit from the Automated manipulation. And Koss recommended that customers sell Automated, so that Koss could fulfill his obligation to Hellerman, while Koss himself was purchasing Automated, to take additional advantage of the manipulation of the price of Automated stock.

B. Stock Fraud and Mail Fraud Counts

The foregoing also establishes the utter want of merit to Koss' claim that the evidence failed to establish his guilt on the mail fraud and stock fraud counts of which he was convicted. Koss' argument appears to be premised on the notion that, as to these counts, the evidence failed to show his participation in a conspiracy pursuant to which these substantive offenses were committed or in a scheme to defraud pursuant to which the mailings charged in the substantive counts occurred. As to Count Two, he appears to make the additional claim that he could not have been a member of any conspiracy or scheme to defraud because,

at the time of the commission of the offense charged in that count, he lacked knowledge of the illegal deal with Hellerman. However, the evidence outlined above establishd that Koss was a member of the conspiracy and scheme to defraud pursuant to which these substantive crimes were committed, and that, as to Count Two, he was fully aware of the crooked deal made with Hellerman prior to the completion of the public offering to dispose of the stock. While as to Count Two Koss relies on certain testimony inconsistent with the evidence establishing his criminal involvement prior to March 2, the jury was entitled to resolve against Koss any conflicts in the evidence. *United States* v. *Zanfardino,* 496 F.2d 887 (2d Cir. 1974).

C. Escrow Account Count

Koss argues that the Government did not prove that Koss actually received money before March 2, which was not deposited in escrow. The Government proved that, Koss sold 15,000 Automated shares in December and that although the offering price was $1 per share, all that was deposited that month in the escrow account was $3,000 which was not derived from Koss' sales of Automated stock. While the Government did not prove exactly when Koss was paid for those shares, the Government did prove that Koss received two checks (GXs 31(b) and 34)) in January, and that no deposits were made into the escrow account between December 31, 19.0 and March 4, 1971. Not one customer's check was ever deposited in the escrow account. The inference was overwhelming that, in part, Koss delayed paying Santis because subscribers' money had not been placed in escrow. And, most significantly, the escrow account balance was never more than the amount due from Koss to Santis after deduction of Koss' compensation.

D. False Documents Count

Koss also contends the Government did not prove that he submitted a false document to the Commission. To the

contrary, the blue questionnaire submitted by Koss on June 15 (GX 75) listed sales of only 4,400 shares to Interstate between April 7 and April 14, and Zardus testified that during that period he purchased 5,000 shares. Mrs. Koss said the document her husband submitted to the Commission as the house account trading ledger (GX 76) was, in fact, Koss' personal position sheet and "meant nothing."

POINT II

The jury properly found a single conspiracy, of which Koss and Koss Securities were members, to manipulate the price of Automated stock.

Koss asserts that the evidence showed that he participated in a different conspiracy than alleged in the indictment, and that, under *Kotteakos* v. *United States,* 328 U.S. 750 (1946), his conviction must be reversed. Koss' argument is foolish.

The evidence presented by the Government is susceptible of no other interpretation than that, in return for Hellerman's successful completion of the offering of Automated shares being made by Koss and Zardus, Koss undertook to participate in a scheme devised by Hellerman to manipulate the price of Automated in the after-market, a plan that required that Hellerman control all available Automated shares. Initially Koss agreed to give Hellerman that control by selling for $1-½ the 15,000 shares previously sold by Koss to his customers for $1. Thereafter Koss changed the bargain to his own advantage by inducing Hellerman to allow Koss to retain and sell for his profit 5,000 shares; but, so as not to depress the price, those 5,000 shares could only be sold in proportion to Hellerman's sales in the fraudulent scheme to drive the market up. In short, not only did Koss agree, as part of a scheme to successfully complete the Automated offering, to let Hellerman rig the subsequent

sales of Automated in the after-market, he insisted thereafter that he also be permitted to share in Hellerman's profits in bilking the public.

In any event, the trial judge charged the jury on multiple conspiracies (Tr. 2176-81), and no objection was taken to the adequacy of the charge. The question of multiple conspiracies was thus fairly put to the jury, and, on the evidence adduced, no other finding as to Koss was possible.

POINT III

Koss was not prejudiced by insufficient pre-trial disclosure.

Koss appears to claim that the denial of paragraphs 7(d) * and 11 ** of his motion for a bill of particulars

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* "7. * * * (d) state whether the government claims that Koss Securities Corporation and Theodore Koss received from the defendants and co-conspirators or from others any money or property for serving as underwriters of Automated Information System [sic], Inc., other than the consideration provided in the underwriting agreement, with the amount of such money or property, the person from whom defendants received the same and the date and place of such receipt."

** "11. State whether the government claims that Theodore Koss and Koss Securities Corporation had knowledge of, or participated in any way in the agreement alleged in paragraph 21(d) of the indictment that Robert Santis would pay to Michael Hellerman approximately one-half of the proceeds of the underwriting, and set forth the extent of such alleged knowledge or participation; (b) in the signing of stock powers for certificates issued in names of subscribers supplied to Stephen [sic] Zardus by Michael Hellerman, alleged in paragraph 21(e) of the indictment, and set forth the extent of such alleged knowledge or participation; (c) in the agreement between Stanley Schwartz and Murray Taylor, alleged in paragraph 21h) of the indictment, to sell common stock of Automated Information Systems, Inc., through Atlantic Securities, Inc., in return for double commissions, and set forth the

[Footnote continued on following page]

violated his Sixth Amendment right to be informed of the charges against him.

In implementation of the Sixth Amendment right to be informed of the nature of criminal charges, Rule 7(c), Fed. R. Cr. P., provides:

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extent of such alleged knowledge or participation; (d) in the agreement among Herbert Shulman, Steven Adlman, Robert Kolbert and Michael Hellerman alleged in paragraph 21(i) of the indictment that Shulman, Adlman and Kolbert would trade and recommend to brokers and investors purchase of shares of Automated Information Systems, Inc., for which they received cash payments, and set forth the extent of such alleged knowledge and participation; (e) in the agreement among Samuel Weisman, Harold Lassoff and Michael Hellerman that Weisman would buy shares of Automated Information Systems, Inc., through Lassoff, alleged in paragraph 21(j) of the indictment, and set forth the extent of such alleged knowledge and participation; (f) in endorsement by Martin Roth and Erwin Layne of checks drawn by Interstate Equity Corporation to order of persons unknown, alleged in paragraph 21(k) of the indictment, and set forth the extent of such alleged knowledge and participation; (g) in purchases of shares of Automated Information Systems, Inc., by Irwin Hyman, in exchange for cash payments to him, alleged in paragraph 21(l) of the indictment, and set forth the extent of such alleged knowledge and participation; (h) in cash payments to William McGee and Stephen Hagler for recommending purchase of shares of Automated Information Systems, Inc., alleged in paragraph 21(m) of the indictment, and set forth the extent of such alleged knowledge and participation; (i) in cash payments offered to Dan Anfang for recommending purchase of shares of Automated Information Systems, Inc., alleged in paragraph 21(n) of the indictment, and set forth the extent of such alleged knowledge and participation."

Prior to the submission of the case to the jury the Government consented that subparagraphs (h), (j), (l) and (n) be stricken from the indictment because no proof of the transactions alleged therein had been adduced (Tr. 1598-1600). Therefore, Koss could not possibly have been prejudiced by the denial of subsections (c), (e), (g) and (i) of paragraph 11 of his motion for a bill of particulars.

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

See 1 Wright, *Federal Practice and Procedure*: *Criminal* § 125 at 231 (1969). It is well settled that an indictment using only statutory language is sufficient. *United States* v. *Debrow*, 346 U.S. 374, 377-78 (1953); *United States* v. *Cimino*, 321 F.2d 509, 512 (2d Cir. 1963), *cert. denied* as *D'Ercole* v. *United States*, 375 U.S. 967 (1964). The indictment in this case went far beyond the limited notice requirement in specifying fourteen different means by which the conspiracy alleged in Count One was accomplished, of which eight were proved at trial, and in specifying fifteen different overt acts in furtherance of the conspiracy, of which nine were proved at trial (Tr. 1801-02).

Specifically Koss claims he was not informed that the following would be proved against him at trial: selling 10,000 shares to Hellerman; guaranteeing forged signatures on stock certificates; knowledge of Santis' kick-back to Hellerman; and cashing a forged check for Hellerman. The denial of the portions of his motion for a bill of particulars now complained of would not have informed Koss that the Government would prove he sold 10,000 shares to Hellerman. Moreover, the indictment clearly stated that, as means of the conspiracy, signatures were forged on stock certificates and checks and Santis agreed to kick-back half the proceeds of the Automated offering. Further particularization of those allegations in the indictment would have only served to require the Government to disclose its evidence in advance of trial, which is not the function of a bill of particulars. *See, e.g., United States* v. *Crisona*, 271 F. Supp. 150, 155 (S.D.N.Y. 1967), (Mansfield, *J.*), *aff'd*, 416 F.2d 107 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970); *United States* v. *Lebron*, 222 F.2d 531, 535-36 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955); *United States* v. *Kushner*, 135 F.2d 368, 673 (2d Cir.), *cert. denied*, 320 U.S.

212 (1943); *United States* v. *Callahan*, 300 F. Supp. 519, 526 (S.D.N.Y. 1969); *United States* v. *McCarthy*, 292 F. Supp. 937, 940-41 (S.D.N.Y. 1968); *United States* v. *Fruehauf*, 196 F. Supp. 198, 199 (S.D.N.Y. 1961). In any event, "[w]hether a bill of particulars should be provided at all, its scope and specificity, if permitted . . . are all matters left primarily to the discretion of the trial judge." *United States* v. *Salazar*, 485 F.2d 1272, 1277-1278 (2d Cir. 1973). Certainly Koss has not demonstrated that Judge Metzner abused his discretion or that Koss suffered any specific prejudice by the denial of portions of his motion for a bill of particulars. *See* 8 *Moore's Federal Practice* ¶ 7.06 [2] at 7-34-35 & n. 16 2d 8d. 1973).

POINT IV

The District Court properly excluded from evidence Koss' cancelled checks, customer account cards and customer signature cards.

The Government stipulated with Koss that certain records produced by Koss pursuant to subpoena, allegedly his confirmation slips and order tickets, were, in fact, produced by Koss pursuant to subpoena; the Government never entered into a stipulation with Koss with respect to cancelled checks, customer account cards or customer signature cards (Tr. 190-96a).

Near the conclusion of the trial Koss offered collectively into evidence, without laying any foundation: (1) alleged customer account cards for all customers who traded Automated stock, showing all transactions by those customers in all stocks they traded; and (2) allegedly all of Koss' cancelled checks payable to his customers for their sales of Automated stock and to other brokers for Koss' purchases of Automated stock. The Government is unable to find in the record any offer into evidence by Koss of documents purporting to be customer signature cards.

With respect to the customer account cards, Koss claimed that such documents, produced pursuant to subpoena in 1974, were evidence that Koss had not intentionally submitted false documents to the Commission in 1971 (Tr. 1743-46, 1861-62). Judge Metzner properly refused to allow those documents into evidence when Koss was unable to isolate a single entry on the approximately fifty such documents that supported his contention (Tr. 1868-69).

Koss offered the cancelled checks for the purpose of establishing that, because Koss bought Automated stock after the price collapsed in June, 1971, Koss thought Automated was a legitimate investment, not a manipulated stock (Tr. 1869-71). The checks did not indicate whether they had been issued in connection with a transaction in Automated stock, nor had any attempt been made to match the checks with other documents that would have resolved the ambiguity (Tr. 1870-75). Judge Metzner then proposed the only viable alternative, which was a stipulation with the Government with respect to the volume of Koss' Automated stock trades after the bust (Tr. 1875-78, 1911-14). But immediately prior to summation, Koss' counsel abandoned the proposed stipulation:

> "The Court: * * * You now tell me that there is no need for me or you or Mr. Sorkin to tell the jury that it is so stipulated because you claim that those facts are presently in the record?
>
> "Mr. Weissberg: Yes, your Honor" (Tr. 1930).

Koss' claim of prejudice resulting from the exclusion of the cancelled checks is accordingly preposterous.

POINT V

The claims concerning Hellerman are without merit.

Layne and apparently Koss advance a melange of arguments centering around Michael Hellerman as grounds for reversal: Hellerman should be deemed incredible as a matter of law; the rehabilitation of Hellerman's testimony constituted an improper assertion by the Government of Hellerman's credibility; and the Government's conduct was offensive to the concept of due process. Those contentions are wholly lacking in merit and generally proceed upon misstatements of the evidence.

The claim that Hellerman should be considered incredible as a matter of law relies upon *Mesarosh* v. *United States*, 352 U.S. 1 (1956). In that case the Court exercised its supervisory power over the federal courts to reverse a conviction based on testimony by a Government witness who, as the Solicitor General disclosed after the trial, had made numerous untrue statements in other proceedings. However, in *Mesarosh*, in which the Court reversed for a *new trial*, the witness' lack of candor was unknown at the time of trial. In this case, the only evidence of duplicity by Hellerman was known at the time of trial and indeed was virtually the only subject of cross-examination by Layne's counsel.

Further, the only facts adduced in support of the accusation of perjury by Hellerman is that Hellerman breached an agreement with the Government not to commit additional crimes and lied to the Government to conceal that breach. Significantly not mentioned are that Hellerman then reached a new agreement with the Government by which for the first time he was required to testify in any case of which he had knowledge. Moreover, no showing has been made that Hellerman has given any perjurious

testimony in the substantial number of cases at which he has appeared as a Government witness. In any event, prior perjury by a witness is an aspect of credibility, to be determined solely by the jury. *Hoffa* v. *United States*, 385 U.S. 293, 310-12 (1966); *United States* v. *Aviles*, 274 F.2d 179, 190 (2d Cir.), *cert. denied* as *Evola* v. *United States*, 362 U.S. 974 (1960); *United States* v. *Reina*, 242 F.2d 302, 307 (2d Cir.), *cert. denied* as *Moccio* v. *United States*, 354 U.S. 913 (1957); *United States* v. *Margolis*, 138 F.2d 1002, 1004 (3d Cir. 1943).*

Nor can it be said that the Government acted improperly with respect to Automated. Hellerman's testimony was that, before the Automated manipulation began, he agreed with Assistant United States Attorney Morvillo to give information and not to commit further crimes. Thereafter, motivated by greed and without the knowledge or approval of the Government, Hellerman entered into the Automated conspiracy. As the Automated manipulation was collapsing in June, 1971 Hellerman told Morvillo about it but placed the blame on Taylor; Hellerman was instructed to stay out of the deal but to report developments (Tr. 296-98, 304-05, 311-15, 345-46). With respect to Taylor, the Government stipulated that, while Taylor also agreed to give information to the Government on or before March 2, 1971, Taylor did not actually provide any information about Automated until June, 1971 (Tr. 1479-82). By June 15, 1971 the Commission was taking Koss' testimony. This case therefore precisely parallels *United States* v. *Corallo*, 413 F.2d 1306, 1321 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969), in which the Court found that Herbert Itkin,

> "* * * whatever else he might have been doing with the FBI to uncover the machinations of the underworld, * * * was in this venture entirely on his own and acting wholly without the knowledge of the FBI until he found it to his interest to tell the FBI, after the last installment of the bribe had been paid."

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* Judge Metzner, of course, charged the jury to scrutinize accomplice testimony with care and to receive it "with great caution" (Tr. 2202).

See also *United States* v. *De Sapio*, 435 F.2d 272, 281-83 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).*

The Government's introduction into evidence of its written agreement with Hellerman was wholly proper and did not constitute an assertion that the Government found Hellerman credible. The thrust of the cross-examination of Hellerman by Layne's counsel was twofold: that Hellerman was a liar, con man and swindler, unworthy of belief, and that Hellerman's motive to testify falsely was his desire to avoid prosecution and receive lenient treatment. Hellerman readily admitted his prior misdeeds. But, in order to establish the leniency accorded Hellerman, counsel for Layne asked numerous questions concerning the punishment that Hellerman had received for all of his criminal activity (Tr.

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* The facts surrounding Hellerman's and Taylor's criminal participation in the Automated scheme establish the want of merit to Koss' claim that he was entrapped as a matter of law by Hellerman and Taylor. Though Hellerman and Taylor had agreed, prior to the Automated scheme, to furnish information to the Government, the evidence was undisputed that Hellerman and Taylor were wholehearted criminal participants in the Automated scheme without any knowledge on the Government's part and in violation of specific agreements both had made with the Government. An issue of entrapment is raised only ". . . when the criminal design originates with officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission *in order that they may prosecute.*" *Sorrells* v. *United States*, 287 U.S. 435, 442 (1932) (emphasis supplied). *Ortiz* v. *United States*, 358 F.2d 107, 108 (9th Cir.), *cert. denied*, 385 U.S. 861 (1966). Moreover, even if Hellerman and Taylor had been active participants in the scheme at the behest of the Government, the entrapment issue posed would have been at most one for the jury. *United States* v. *Russell*, 411 U.S. 423 (1973). But Koss never requested submission of the entrapment issue to the jury, and, if he had, the trial judge would have had to refuse, not simply because Hellerman and Taylor were not acting for the Government but also because the evidence established that the initiation of the scheme was not by Hellerman and Taylor and because the proof of Koss' predisposition was overwhelming and virtually uncontroverted. *E.g.*, *United States* v. *Greenberg*, 444 F.2d 369 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971).

358-71, 374-80). Layne's counsel also asked and insisted on a "yes" or "no" answer to the question whether Hellerman had advised a witness Schoengold to testify falsely before the S.E.C. Judge Metzner allowed the Government, on redirect examination, to introduce Hellerman's agreement with the Government, with all references to organized crime and threats to his life on account of testimony deleted (Tr. 400, 404-06), and to state exactly what had been said to Schoengold (Tr. 412-14). The provisions of Hellerman's agreement in which he promised not to commit perjury on pain of prosecution for all past misconduct were no more than another part of Hellerman's arrangement with the Government which defense counsel had already partly explored and which, as Judge Metzner pointed out, defense counsel was free to argue had been breached. Such redirect examination was no more than completion of areas that had been explored only partially on cross-examination, and therefore proper.

Finally Layne complains of the rehabilitative testimony by witness Robert Kolbert that he had lied to the Commission about a matter unrelated to Automated, and to Assistant United States Attorney Sorkin about Automated, because of fear for his life if he told the truth. Such testimony was permitted only upon the explicit limitation that the fear was not engendered by any of the defendants on trial, and was entirely proper. *United States* v. *Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States* v. *Berger*, 433 F.2d 680, 683-84 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971); *United States* v. *Franzese*, 392 F.2d 954, 960-61 (2d Cir. 1968), *vacated on other grounds* as *Giordano* v. *United States*, 394 U.S. 310 (1969). Having chosen to impeach Kolbert's testimony by proof of prior false statements he had made relating to this case and otherwise, Layne is hardly in a position to complain that the Government was permitted to explain the reason for them, for although not a legal defense to a criminal charge, Kolbert's explanation that he had lied because he feared for his life was relevant to the jury's weighing of his credibility at trial.

POINT VI

Judge Metzner's instructions on the conspiracy count were sufficient.

Relying on *United States* v. *Cangiano,* 491 F.2d 906 (2d Cir. 1974); *United States* v. *Houle,* 490 F.2d 167 (2d Cir. 1973); *United States* v. *Farr,* 487 F.2d 1023 (2d Cir. 1973); *United States* v. *Alsondo,* 486 F.2d 1339, 1343 (2d Cir. 1973), *cert. granted* as *United States* v. *Feola,* 42 U.S.L.W. 3584 (April 15, 1974) and *United States* v. *Crimmins,* 123 F.2d 271 (2d Cir. 1941), Layne claims that the Court's instructions to the jury on the conspiracy count were inadequate because, he argues, they failed to specify that, in order to convict, the jury must find that Layne specifically knew of and agreed to the use of the mails as part of the conspiracy. The argument is without merit.

As a preliminary matter, it should be noted that trial counsel, who also represents Layne on appeal, took no exception to Judge Metzner's charge on this basis or for any other reason (Tr. 2208). For any relief, therefore, Layne must show that "plain error" was committed within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure, that is, that ". . . serious injustice was inflicted upon [the] defendant, or [that] he was convicted in a manner inconsistent with fairness and integrity of judicial proceedings. . . ." *United States* v. *Bryant,* 480 F.2d 785, 789-790 n.3 (2d Cir. 1973). No such showing has been made here.

First of all, it is clear that the jury was made aware by the Court's instructions that a guilty verdict on the conspiracy charged in Count One required a finding of an agreement to use the mails. Judge Metzner specifically charged the jury with respect to the conspiracy count in part as follows:

> "To prove a conspiracy here, the evidence must show beyond a reasonable doubt the existence of each one of the following material elements:

"First, that the conspiracy described was formed and existing at or about the time alleged:

"Second, that it was part of the conspiracy to do any one of the following:

"(1) that the defendants and co-conspirators unlawfully, wilfully and knowingly, in the offer to sell and sale of securities, to wit, the common stock of Automated Information Systems, Inc., by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, would violate Section 17(a), to which I have already referred;

"(2) that the defendants and co-conspirators in connection with the purchase and sale of securities, to wit, the common stock of Automated Information Systems, Inc., would and did directly and indirectly, use means and instrumentalities of interstate commerce and the mails, to use and employ manipulative and deceptive practices and contrivances in contravention of Rule 10b-5 of the rules and regulations promulgated by the Securities & Exchange Commission;

"(3) that the defendants and co-conspirators, having devised and intending to devise a scheme and artifice to defraud, and attempting so to do, would place and cause to be placed in Post Offices and authorized depositories for mailed matter and would cause to be delivered by mail, according to the direction thereon, certain matter to be sent and delivered by the Post Office Department . . ." (Tr. 2173-74).

These instructions told the jury that before they could convict any defendant, they had to find the existence of a conspiracy (of which the defendant was a member) that had as part of its aims the commission of fraud by use of the mails. The instructions were, accordingly, more than suf-

ficient to satisfy the doctrine of *Crimmins*, particularly under a "plain error" stadard. See *United States* v. *Mauro*, Dkt. No. 74-1270 (2d Cir., June 26, 1974) slip op. at 4458-4460.*

Moreover, had there been a deficiency in the trial judge's instructions of the kind complained of, on the facts of this case no reversible error could have been committed. *United States* v. *Cangiano, supra,* 491 F.2d at 910-911. The evidence was that Layne agreed to join in a manipulation of Automated stock in the after-market in return for a one-quarter share in the profits; the venture could not earn profits unless stock were sold, which requires mailings for the transmission of payments and confirmations of transactions as part of the ordinary course of the stock brokerage business. Layne forged signatures on Interstate's checks to telephone book purchasers of Automated stock, which checks were the proceeds of sales of stock which were paid for and confirmed by use of the mails. Layne picked up

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* In *Mauro*, this Court appears to have changed the *Crimmins* rule from one of statutory construction of Section 371 to one of Congressional intent. Slip. op at 4461. Since Congress did not choose to make knowledge or intent with respect to use of the mails an essential element of the substantive offenses in 15 U.S.C. § 77q and 18 U.S.C. § 1341, *United States* v. *Maze*, 414 U.S. 395, 400 (1974); *Pereira* v. *United States*, 347 U.S. 1, 8 (1954); *United States* v. *Marando*, Dkt. No. 73-2378 (2d Cir., July 3, 1974); *United States* v. *Wolfson*, 405 F.2d 779, 783-784 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969), there is no rational basis to suppose that Congress intended to make such knowledge or intent part of the offense of conspiracy to violate these two sections. However, since the instructions here amply complied with the strict requirements of *Crimmins* and *Mauro*, this Court need not, in our view, reach the question of the continuing vitality of the *Crimmins* doctrine, particularly since the matter is before the Supreme Court in *United States* v. *Alsondo, supra.* The Government's position continues to be that *Crimmins* should be overruled in its entirety for the reasons stated in our brief in *Mauro.*

5,000 shares of Automated stock from Koss for sale by the Hellerman group, which sales required payment and confirmation by mail. And finally Layne placed wooden tickets which he must have known would cause the victim brokers to mail payments for the stock they purchased on Layne's behalf. Layne ". . . if . . . engaged in any conspiracy at all, had to actually know that . . . [the mails were] involved." *United States* v. *Cangiano, supra,* 491 F.2d at 911.

POINT VII

Layne alleges no prejudice cognizable on appeal resulting from the joint trial with Koss or from language of the indictment.

Layne now alleges that it was unfair to try him jointly with Koss because of prejudice resulting from the purported facts that: Koss alone was charged with making false statements and using false documents, proof of which "rubbed off" on Layne; their defenses were irreconcilably inconsistent; there was stronger evidence against Koss than Layne. Those allegations are without merit.

With respect to the claim that proof of Koss' perjury adversely affected Layne, first, Layne moved before trial only for a severance from Koss or, in the alternative, of what was labeled by Layne the perjury counts, Counts Twelve and Thirteen, which only changed Koss. While Judge Metzner initially granted Layne's request that those counts be severed, although he need not have done so, *United States* v. *Sweig,* 316 F. Supp. 1148, 1157-1159 (S.D. N.Y. 1970), *aff'd,* 441 F.2d 114 (2d Cir.), *cert. denied,* 403 U.S. 932 (1971), on reconsideration Count Thirteen was rejoined by order dated March 29, 1974. Significantly Judge Metzner's order restoring Count Thirteen recited that the defendants had not objected thereto, and no one ever suggested the contrary. Second, there is no reason to suppose

that the jury was unable to follow the statements of Judge Metzner and the Assistant United States Attorney limiting the offer of the testimony which concerned only Koss on Count Thirteen (Tr. 1302, 1321-22, 1379, 1442). And third, it is perfectly obvious that the evidence of false statements and use of false documents by Koss would have been admissible against Koss on the issue of consciousness of guilt whether or not Counts Twelve and Thirteen were severed. *United States* v. *Tropiano,* 418 F.2d 1069, 1081 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970); *United States* v. *DeAlesandro,* 361 F.2d 694, 697-98 (2d Cir.), *cert. denied,* 385 U.S. 842 (1966); *United States* v. *Smolin,* 182 F.2d 782, 786 (2d Cir. 1950); *United States* v. *Sweig, supra,* 316 F. Supp. at 1158. *Cf. United States* v. *Weiss,* 491 F.2d 460, 467 (2d Cir. 1974).

The claim that Layne was prejudiced by having to present a defense inconsistent with Koss' was never raised before or during trial and is therefore unavailable on appeal. *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied,* 383 U.S. 907 (1966). The reason the claim was never before made is obviously that, in fact, Layne's defense and Koss' defense were completely consistent: Hellerman was not to be believed. Counsel for Koss did state in passing at the beginning of his summation that he believed the evidence showed a conspiracy of which Layne was a member; nevertheless, during that summation Layne's name was subsequently mentioned only in connection with Koss' argument that he did not have 5,000 shares for Layne to pick up for delivery to Hellerman, an argument of which Layne was a beneficiary. In light of Judge Metzner's advising the jury that

> "[t]he summations of counsel which you have heard are not to be considered as evidence, but only as arguments to you as to what counsel feel you should find from the evidence" (Tr. 2199),

no presumption can be indulged in that Layne was unduly prejudiced by an isolated remark by Koss' counsel. Certainly it was insufficient to warrant a finding that Judge Metzner abused his discretion in not granting Layne a severance. *United States* v. *Jenkins,* 496 F.2d 57, 67-68 (2d Cir. 1974).*

Layne's final contention in regard to his joint trial with Koss is that he was prejudiced because the proof against Koss was so much more probative than that against him. That contention ignores the fact that, in addition to Hellerman, witnesses Zardus, Santis, Adlman, Kolbert, Levine, McGovern and Willis furnished testimony strongly implicating Layne. And the major flaw in Layne's reasoning is that, even had he been tried apart from Koss, all evidence of acts and declarations by Koss in furtherance of the conspiracy would still have been admissible against 173 (2d Cir.), *cert. denied,* 387 U.S. 906 (1967); *United States* v. *Granello,* 365 F.2d 990, 995 (2d Cir. 1966), *cert. denied,* 386 U.S. 999 (1967); *United States* v. *Pugliese,* 153 F.2d 497, 500 (2d Cir. 1945). Layne's argument falls far short of the standard enunciated in *United States* v. *Capra,* Dkt. No. 74-1068 (2d Cir., July 26, 1974) slip op. at 5009, that:

> ". . . where the evidence against the particular defendants who request severance is not 'so little or so "vastly disaproportionate" ' in comparison to that admitted against the remainder of the defendants, *United States* v. *Rizzo,* [491 F.2d 215, 218 (2d Cir. 1974)], severance is not required."

The argument that Layne was prejudiced by the indictment's description of him as a "self-employed promoter and finder" is difficult to comprehend since neither "self-employed," "promoter" nor "finder" is a term of opprobrium.

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* Were a contrary rule the law, it would be easy enough for defense counsel at a joint trial improperly to secure severed retrials by making disparaging remarks about each other's clients in their respective summations. However, no suggestion is intended that Mr. Weissberg's remark here was so motivated.

POINT VIII

The Government's response to Layne's request for disclosure of electronic surveillance was sufficient.

In his omnibus pre-trials motions, Layne requested that he be allowed to join in all other motions made by co-counsel, including "[d]isclosure of electronic eavesdropping or wiretapping, if such occurred." The "motion", which was unsupported by affidavit from either Layne or his attorney, did not even claim that Layne had been the subject of electronic surveillance. Government counsel denied that the evidence presented to the Grand Jury was the product of electronic surveillance and stated that the Government would not offer such evidence at trial. There is no claim that any such evidence was introduced below.

Layne now argues that the Government's response was insufficient and that on the basis of his request it should have been required to conduct a comprehensive investigation to determine whether he, his premises or telephones were "ever" the subject of electronic surveillance by "all surveilling agencies" and that the results of this investigation should have been fully explored at an evidentiary hearing.

This claim is patently frivolous. Having failed even to allege that he had been the subject of electronic surveillance, Layne was not even entitled to compel the Government to affirm or deny the occurrence of any electronic surveillance under 18 U.S.C. § 3504. The Government's response was sufficient. *See United States* v. *Nardone,* 308 U.S. 338, 341 (1939); *United States* v. *Alderman,* 394 U.S. 165, 183 (1969); *United States* v. *Maggadino,* 496 F.2d 455, 459-60 (2d Cir. 1974); *Beverly* v. *United States,* 468 F.2d 732, 752 (5th Cir. 1972); *United States* v. *Alter,* 482 F.2d 1016, 1026 (9th Cir. 1973).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD WILE being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 16th day of September, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Morris Weissberg, Esq., 15 Park Row, New York, New York 10038

Edward S. Panzer, Esq., 299 Broadway, New York, New York

Robert Mitchell, Esq., 51 Chambers Street, New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Richard Wile

RICHARD WILE

Sworn to before me this

16th day of September, 1974.

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975